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SOME OBSERVATIONS ON THE NEGOTIABLE INSTRUMENTS ACT

An able apologist[1] for and critic of the Negotiable Instruments Law has said, that, to judge the act fairly, we must "realize that the Commissioners (who framed it) were attempting to *codify* the law. Their aim was not to reform the law of negotiable paper. It was to state accurately and concisely the existing law." Their aim as we conceive, was to express *a* law of negotiable instruments, with a view to the adoption of their expression by the legislatures of many states, and, the conversion of it into law for these states. As the laws of the states already differed from each other, such enactment implied the repeal in any particular state of more or less considerable portions of the existing law thereof. In a good many respects the Act of 1901 has changed the negotiable instruments law of Pennsylvania. Not merely a new expression of the old law was then, the aim of the commissioners, but, at least a partial reformation of it.

One is surprised to find, on examining the law, that it does not profess to cover the entire subject. Why it does not, is not revealed. Did the commissioners grow weary before completing their task? Whatever the cause, they were apparently conscious that they had omitted problems

[1]Charles L. McKeehan, Esq.

that had been theretofore provided for, for they stipulate that "In any case not provided for in this act the rules of the law merchant shall govern."

This expression, "the rules of the law merchant" reveals that the commissioners were subject to the hallucination that there was such a thing as the "law merchant." Law is the body of principles for the regulation of human action, which the law making organ of any particular state or country has elaborated. There is in England, no law but the law of England; in Pennsylvania, but the law of Pennsylvania; in New York but the law of New York. The law may be about negotiable paper, about bailments, about contracts, about crimes, about land, but in every case it is the law of England, or of Pennsylvania, or of New York, about these subjects. There is no more a law about bills and notes, detached from any particular sovereignty, than there is a law about real property or about torts. It may be that on a given subject, the law of one sovereignty is precisely like that of another sovereignty, but they are not, for that reason, one law but two laws, English, Pennsylvania, New York. To say that the law merchant shall govern, where the act of 1901 is silent, is hardly more than to say that the pre-existing law in this state, about negotiable paper, shall continue in so far as not modified or repealed by this act.

We propose to notice some of the infelicities and obscurities with which the negotiable instruments act unfortunately abounds.

Sect. 1, Art. 1: An instrument must contain a promise or order to "pay a sum certain in money." A sum in money! What is a sum? An amount? A sum *in* money is an amount *of* money?

The instrument "must be payable on demand or at a fixed or determinable future time." A promise or order is to do something which has not yet been done. It must be done, then, at some future time. Of millions of possible times, at which? Something, somebody must deter-

mine. The payee may, by making a demand when he chooses. The time will be determinable, within certain limits, by his volition. Or, a certain intervening time may be specified; e. g. 3 months after date; or, on July 1st. Or, some event, possible, or certain to occur, but the time of whose occurrence is not predictable, may be selected, to define the time for making the payment. The act says "fixed or determinable." Are these two properties, or but one? Apparently, they are but one, for Sect. 4 says an instrument is payable at a "determinable" time, when it is payable "at a *fixed* period after date or sight." Why then was the word "fixed" used?

Section 4 says the time of payment may be defined as "on or before a fixed or determinable future time specified." Does this mean that the instrument may impose an obligation to pay "before" this specified time? If so on what event is this duty of anticipatory payment to arise? Will the volition of the payee, expressed in a demand, suffice? May it be some other event, contingent or certain to occur, whose actual occurrence before the specified time shall precipitate the duty of payment?

Sect. 1, Art. 1, states that the instrument must contain an "unconditional promise or order to pay," etc. Sect. 3 says virtually that the promise or order is not made conditional by the indication of a fund from which the maker of a note or drawee of a bill is to reimburse himself, or of an account which is to be "debited with the amount." With what "amount?" The section also states that a statement in the instrument of the transaction which gave rise to it, does not defeat its negotiability.

This section is criticised by Prof. Ames, because, as he thinks, it does not make conditional, and therefore non-negotiable, a promise to pay money which is collateral security for another debt due to the payee, although the fact that it is collateral is expressed in the instrument. But, why is not the distinction taken, between a collateral note, payable after the principal debt, and one payable before?

If B, indebted to A on a bond, mortgage, or otherwise, the debt being payable Aug. 1st, 1916, gives a note for the amount, payable July 1st, 1916, and expressed to be a collateral security for the debt, why should it be said that the note payable July 1st, is conditional on non-payment of the debt which is payable Aug. 1st? Charles L. McKeehan, Esq., agrees with Prof. Ames that a note expressed to be collateral to a debt, is *ipso facto* conditioned on the non-payment of the debt.

The commissioners intended by the second clause of Sect. 3, to secure negotiability to instruments although they were given for the price of an article the title to which was reserved to the vendor until payment. Charles L. McKeehan, Esq., shows that such notes are usually, though not always, regarded as negotiable,[2] and he states that the object of the commissioners was to adopt the principle that they are negotiable. He thinks however, that some courts may fail to find this purpose in the statute and may continue to deem notes of this sort non-negotiable. Such also is Prof. Ames' opinion. The object of securing uniformity of law in the different states will thus be frustrated. Why were the inventors of the law not more explicit?

Sect. 5 states that an instrument containing a promise or an order to do any act additional to the payment of money, is not negotiable. Why was this dogma adhered to? Why should *bona fide* transferees of such an instrument be unable to enforce the money part, because unable to enforce the rest? So, why did the courts say, as they did, that the inclusion in the promise, of a contingent and uncertain sum of money, should vitiate the negotiableness of the note, even for the certain sum? In some jurisdictions, e. g. in Pennsylvania, the act has made the instrument negotiable even for its uncertain part. Why did the commissioners not have originality enough to make a composite promise to pay money

[2]Cf. Gazlay v. Riegel, 16 Super. 501.

and to do other things, negotiable at least as to the promise to pay money?

Confession of Judgment

Some courts had held that a warrant of attorney to confess judgment contained in an otherwise negotiable instrument, rendered it non-negotiable. The flimsiness of the reason for so holding may be discovered by a perusal of Overton v. Tyler, 3 Pa. St. 346. Gibson, C. J., holds such a note non-negotiable (1) because to be negotiable, a note must be framed in the "fewest possible words." (He admits that this is a "minor" reason. He might have said it was minuscule) (2) because it must be "free from contingencies or conditions that would embarrass it in its course." But what is "its course?" Payment at maturity will embarrass it in its course. It is partially negotiable, even after maturity, until it is paid. A restrictive endorsement may arrest the note or bill in its course, by making it further non-negotiable. (See Sect. 36). Yet such liability to the loss of negotiability before maturity, has not been supposed to be inconsistent with negotiability until such restrictive endorsement. How can the destructibility of the note, before maturity, by absorption into a judgment, interfere with negotiability until such absorption? (3) The presence of the warrant evinces that "the object of the parties was not a general but a special one?" (An utterly unmeaning expression.) What is a general object? The justice alludes to the fact that by entering the judgment, the debt is "attached, as an incumbrance to the maker's land." But suppose he has no land? And what hinders a lien for a debt expressed by a note in favor of the holder? A mortgage may secure a note, which does not for that reason, lose its negotiability. (4) A warrant to confess, being collateral to the note, would not pass to a subsequent holder by endorsement or delivery. Therefore the promise could not pass! But why does a judge dogmatically say that the warrant shall not and therefore cannot pass? The waiver of stay

and exemption laws can pass. Why not the warrant?[3] But, even if the warrant could not pass, why should not the promise?

The unsubstantiality of the objections to the negotiability of a note with warrant to confess judgment after maturity has been discerned by the commissioners. They have, for no adequate reason, while abolishing the principle that a warrant to confess judgment after maturity shall destroy negotiableness, contented themselves with allowing courts of the various states to differ as to the effect of a warrant to confess before maturity, unless we are to understand the express assertion that a warrant to confess if the note be not paid at maturity, is not inconsistent with negotiability, to be an implied assertion that a warrant to confess before maturity shall render the note non-negotiable.[4]

There are some states where the effect of a warrant of attorney on negotiability has not undergone decision. Why, in such states, should the commissioners have influenced the adoption of the principle that the incorporation of a procedural device for the prompt legal enforcement of the promise should render the instrument non-negotiable?

The 4th clause of section 5, while apparently forbidding, to a negotiable instrument the capacity to be transformed before maturity into a judgment, does allow of the transformability of it from an obligation to pay money, into one to do some other thing, consistently with its negotiability. At his election, the holder may require of the maker, something else than the payment of money!

Instruments Payable to Bearer

Sect. 9. When an instrument purports to be payable to bearer, that is, uses the word "bearer" to describe the

[3]Cf. Fritz v. Horton, 243 Pa. 187.

[4]National Bank v. Beaver, 25 Super. 494, holds that a note with authority to enter judgment "as of any term," is not negotiable.

payee, there can be no question that it is so payable. If payable in terms to a named person *or* bearer, it is likewise payable to the bearer, as if no person had been named. His endorsement is unnecessary, in order to entitle any bearer to payment. The section says, that when the instrument is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it, it is payable to bearer. Two things are necessary: (1) that the payee named should be a fictitious or non-existing person i. e. a *person,* which person is fictitious or non-existing. (2) The fictitiousness or non-existence of this person must at the time of the issue of the instrument, be known to the drawer (of a bill) or the maker (of a note). Non-existent things need not be fictitious. There are billions of non-existent men. As soon as any specific man is imagined, assumed, to exist, who does not in fact exist, a man is feigned; he is fictitious. The act of naming a non-existent man, as payee, makes this man fictitious. The two words are therefore virtually one. There may be a real man who is known by a certain name. It is possible for the maker of a note to use a name of an existing man, as payee, without the intention that he shall be the payee, and with the intention to make payee, an unnamed person, to be ascertained by the delivery to him of the instrument. In this case, since the bearer of the name is not the payee, and since the name is not employed to stand for any determinate person, and therefore the promise to pay is not complete (since there can be no payment without payment to somebody) until delivery of the instrument, with intention that the deliveree shall be the payee, such an instrument is payable in terms to a non-existent, a fictitious person. Although an existent person bears the name, he is not intended by that name. No existing person is intended by it.[5] If the instrument is, in the intention of the maker, not payable to any determinate person, whether

[5]Snyder v. Corn. Exch. Nat. Bank, 221 Pa. 599; Cf. Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26.

there be an actual person who bears the name, or not, the instrument is properly treated as one payable to the bearer. It follows that since an endorsement, if made, must be made by some actual person, the maker must intend to make the instrument payable to bearer without endorsement. Hence is inferred the passing of title to the deliveree, even when there is an endorsement by the maker, in the fictitious name.

Instruments not in terms payable to bearer, may become payable to bearer; e. g. by an endorsement in blank by the payee, or, after a special endorsement by him, by an endorsement in blank by his special endorsee. It was formerly held that, when the payee endorsed in blank, the note became payable to bearer, whether later endorsements were special or in blank.[6] The holder was obliged when suing, to prove only the endorsement of the payee. No proof of any endorsement by the person from whom he obtained it or from any antecedent owner, later than the payee, was necessary. The negotiable instruments act makes a bill payable to bearer when it is expressed to be so payable, or when, not purporting to be payable to bearer, its only or ultimate endorsement is in blank. Charles L. McKeehan, Esq., sees in this expression a declaration that, if any endorsement, later than that of the payee is special, even though the payee's is in blank, the instrument is not payable to bearer, until a blank endorsement following and that it ceases to be so payable as soon as another special endorsement follows. It is unfortunate, if this is the correct interpretation, that the act is not more explicit.

The Date

Sect. 12 states that an instrument is not invalid because ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. Does this mean that, if it is done for such purpose, the instrument shall be

[6]Mitchell v. Fuller, 15 Pa. 268; Smith v. Clarke, 1 Espin. 180.

invalid? If so, why not say so? But why should it be invalid as to *bona fide* purchasers, because of the falseness of the date for an illegal purpose? If the purpose itself would not make it invalid, why should the use of a false date, in order to effect this purpose, make the note or bill void?

There follows the statement, "the person to whom an instrument so dated is delivered, acquires the title thereto as of the date of delivery." At what other time could he acquire the title? Before delivery? After delivery? This statement is superfluous. The 16th section declares every contract on a negotiable instrument incomplete and revocable until delivery for the purpose of giving effect thereto. Is that what the framers of the act really meant? Is the contract revocable? Or, is there in existence, any contract, until delivery with the purpose of giving effect to the instrument?

Incomplete Instrument

Sect. 15 is censurable for obscurity. Does it mean "Where an incomplete instrument has not been delivered (by the person whom it purports to charge) it will not, (if got possession of by another, without his consent and) completed and negotiated without authority (of the person whom it purports to change) be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery?" The act does not say that it shall be a valid contract, as against any whose signature is placed on it after negotiation. Will it?

Presumed Delivery

As between immediate parties the delivery of an instrument or its delivery with the authority of the maker, drawer, acceptor or endorser, may be denied, and the title of the person in possession thus refuted. "Where the instrument is in the hands of a holder in due course, a valid

delivery by all parties prior to him is conclusively presumed." This must be subject to the exception of cases covered by Sect. 16. "A valid and intentional delivery" is presumed, says the section. But can a delivery be valid, which is not intentional? Can an intentional delivery fail to be valid?

Liability of One Signing As Agent

If one signs in such way as to indicate that he signs for a principal, he is not liable on the instrument, says Sect. 20, if he was duly authorized. But, is he liable on the instrument, if he was not duly authorized? If the enacters of the statute intended to say so, why have they not said so distinctly? It is one thing to be liable on a feigned warranty of authority, and another, to be liable "on the instrument."

Validity of an Infant's Endorsement

The endorsement of the instrument "by a corporation or by an infant," says the 22d Sect. "passes the property thereon" notwithstanding that from want of capacity the corporation or infant may incur no liability thereon." Prof. Ames' criticism that, if this means that the property passes irrevocably it introduces a radical and considerable change in the law as to the rights of infants, and, if it means simply that the infant's endorsee has power to enforce payment from all parties prior to the infant, it is ambiguous, is not answered by Mr. McKeehan's suggestion that the title does pass by an infant's assignment, although it may subsequently be retracted. Corporations and infants are coupled together. Is a corporation assignment valid until revoked? If its endorsement is understood to pass an indefeasible title, why should not the infant's be understood to be intended likewise to pass an indefeasible title?

Forgery of a Signature

Sect. 23 declares that no right is acquired by a forged or unauthorized signature, "unless the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." That is very like saying that the forged signature is void unless it is not void. If the intention was to provide for cases in which one might be estopped from disputing the genuineness of the signature, or the authority of the person who made it, some clearer expression might have been invented.

Consideration

Sect. 25 says, "An antecedent or pre-existing debt constitutes value" and "value is any consideration sufficient to support a simple contract." Are "antecedent" and "pre-existing," two qualities, or but one? If the debt pre-existed but does not continue to exist at the time of making the note, is it a consideration? If it continues, how is it a pre-eisting debt? If a debt originating before the note, but continuing until its making and after, is intended, why is some more accurate statement not devised? Antecedent to what? While A owes B $50, he gives to B for B's accommodation, a note for $5000. Is it not plain that an antecedent debt is not a consideration unless the existence of the debt is the motive of the making of the note and an object of the making is either to increase the creditors' security solely, or to increase it and thus obtain extension of the credit, or some other supposed advantage? The "value" in contemplation, is value to the maker of the note, (for detriment to the creditor is excluded) but how can the fact that one is already indebted be a consideration? What the inditers of the act intended, was, that a note given to increase the security of the creditor, should need no value to the maker,

in order to support it.[7] Instead of frankly abolishing for the occasion, the principle that consideration is necessary to a contract, they pretend to save the doctrine by arbitrarily decreeing that that shall be deemed a consideration which answers to no definition of that word.

The 26th section states that "where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." A makes a note for the accommodation of B. B asks C to endorse it, also for his accommodation. B then sells the note to D. Although, prior to this transaction between B and D, no consideration affected A or C, that sale, involving the detriment to D, of the spending of his money, became a consideration for A's making and C's endorsing.

Endorsement in Blank

Section 34 says that "An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery." Taken literally this is inconsistent with Sect. 9, clause 5, which says that an instrument is payable to bearer "when the only or last endorsement is an endorsement in blank." This seems to imply that if any other than the last, in a series of endorsements is in blank, the instrument is not payable to bearer.

Restrictive Indorsement

By Sect. 37 a restrictive endorsement confers on the endorsee the "right to bring any action thereon, that the endorser could bring." The endorser could not sue himself. Can the endorsee then, not sue him? If A endorsed, for a consideration the note to B, for the use of C, B

[7]Brooklyn City and N. R. Co. vs. Nat. Bank of Republic, 102 U. S. 14, where Harlan, J., strains his ingenuity to discover a consideration in the duties assumed by the creditor towards the debtor with respect to the note.

is a restrictive endorsee, but he should have the power to sue A on the endorsement. The section is defective, as Prof. Ames points out, in not providing for this case.

Qualified Endorsement

Sect. 38 stating that a qualified endorsement "is made by adding to the indorser's signature the words "without recourse," and that such an endorsement does not impair the negotiable character of the instrument, nevertheless adds that it constitutes the endorser a mere assignor of the title to the instrument." An assignor is one who assigns. If the indorser is a mere assignor, is the other party to the act, a mere assignee? But, to so hold, is to make him liable to all the defenses to which his assignor would be liable. There is a want of precision in the use of the expression "mere assignor." What the enacters meant to say was that an endorser could eliminate the usual incident of endorsement, viz, his conditional liability for the payment of the instrument, without affecting its other incident, of passing the right to a *bona fide* endorsee, of enforcing the instrument according to its tenor.

Conditional Indorsement

Section 30 authorizes parties liable to pay, to pay the endorsee, without heeding the condition annexed to the endorsement. It adds, that the conditional endorsee, will hold the instrument or the proceeds (when he receives payment of it) "subject to the rights of the person indorsing conditionally." But, what are these rights? To recall the note, or to demand the proceeds, if it has been paid? Why use so vague a phrase?

Special Endorsement of Instrument

Sect. 40 directs that an instrument payable to bearer, though specially endorsed, may be further negotiated by delivery. Sect. 9, clause 5, as we have seen says that an instrument is payable to bearer when the only or the last endorsement is in blank. If an instrument payable to

order, is indorsed in blank, and is specially endorsed by a subsequent holder, it is not, under section 9, payable to bearer. Under section 40, it apparently is payable to bearer. The reconciliation of the two sections, as Charles L. McKeehan, Esq., suggests, is effected, by supposing that the enacters of the act, by the expression "Where an instrument, payable to bearer, is specially endorsed," meant originally payable to bearer.

The section states that the person endorsing specially an instrument payable to bearer "is liable as endorser to only such holders as make title through his endorsement." If a specially endorsed instrument may be negotiated by delivery, the endorsement of the special endorsee is not necessary to confer title on a holder. In what sense then, does any subsequent holder "make title through his endorsement?"

Does a subsequent holder "make title through the indorsement," when he shows that he directly or indirectly acquired the instrument from the endorser, by means of the endorsement, although proof of such derivation would not be necessary, in order to justify a recovery from the maker or acceptor?

Transfer Without Indorsement

Section 40 declares that a transferee for value with out indorsement acquires the title of the transferor, and also the right to have the endorsement of the transferor. But, if so, why is an actual endorsement necessary? Why not treat, as done, that which ought to be done? A note made for accommodation, is transferred by the payee to X for full value, but without indorsement. Since the payee could collect nothing on it, neither can his transferee. The note is obtained by fraud, but is transferred to X, a purchaser without notice. X cannot enforce it, though he has a right to an endorsement, because he has not in fact procured it. If after X has paid his money, he learns of the fraud before he procures the indorsement, he is not pro-

tected as a *bona fide* purchaser for value. Prof. Ames is discontented, with reason, with this position. Mr. McKeehan is satisfied with it.

Infirmity in Instrument—Defect in Title

Two species of defects seem to be recognized in Sect. 54, 55, 56, and 57; infirmity in the instrument which is not a defect of title, but constitutes a defense, and defect in the title. The title of any person is said to be defective when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration. He also has the power, apparently, to make his title defective *ex post facto* If a payee obtains a promissory note by fraud, it would seem that this circumstance is an infirmity in the instrument. But, it is also styled a defect in the title. Infirmity and defect seem there to be the same. But although there might be no infirmity in the note itself, a holder later than the payee might have a defective title to it. Fraud, duress, or force and fear, are enumerated as making a defective title. What is the difference between duress and force and fear? The lack of independent criticism in the compilers of the statute, is revealed in the retention of the words "force and fear." They are found in the Bills of Exchange Act of England, and they were there inserted because the Act was intended to operate in Scotland, where the word "duress" is unknown to the law. As "duress" is known to the law of all the American states, and "force and fear" is not a recognized equivalent, the latter expression should have been omitted from the American acts. Prof. Bunker naively observes,[8] "The introduction of these words into the American act shows with what fidelity it follows the English statute."

There are two sorts of "defects" of right, with respect to negotiable instruments; defects, based on fraud, duress,

[8]The Negotiable Instruments Law, p. 107.

illegal consideration in procuring the instrument's execution, and fraud in the negotiation of it, and defects not involving these facts, e. g. failure or want of consideration. The holder in due course may enforce the instrument, despite either sort of defect, but, on proof of the first set of facts (fraud, duress, etc.) the burden is put on the holder who sues, to prove that he is or one under whom he claims, was, a holder in due course. Sect. 59.

But is there any adequate reason for the retention of this distinction? A defence is a defense. Why should a defense of one sort compel affirmative proof by the plaintiff that he is a holder in due course, and defence of the other sort, not? If the character of the facts constituting the defence were such as in the one class to be probably known to the purchaser of the instrument, and in the other class, not, there would be a reason for the distinction, but it is no more likely that the purchaser will know that there was duress or fraud or illegality, than that he will know that there was a want of consideration.

Notice of Infirmity

The 56th section explains that a holder, in order to be held to have had notice of infirmity or defect of the instrument must have had actual knowledge of it, or "knowledge of such facts that his action in taking the instrument amounted to bad faith." The expression "bad faith" is extremely vague. If the facts known awaken suspicion that something exists that would constitute a defence, does the holder take it in "bad faith?" The phrase is not in the English Bills of Exchange Act. It should not have been in the American act. If the purpose was to declare that negligence in purchasing a note or bill should not be the equivalent of notice, why did its author not say so? If it was the intention to say that if the known facts generated a belief or a suspicion that some defect existed, or that a specific defect existed, that

would be a defence, why were not clear terms used to express it?

The 59th Sect. which puts on the holder the burden of proving that he is a holder in due course, when it is shown that the title of any person who has negotiated the instrument was defective, contains the exception that in a suit against a party who became bound on the instrument, (e. g. the maker, the drawer, the acceptor, an endorser,) before the title became defective, the burden will not be on the plaintiff to prove that he is a holder in due course. If A makes a note payable to B, to which A has, as against B, no defence, and C fraudulently obtains the note from B, of which fact A, when sued by C could take advantage, D a bona fide purchaser of the note, from C, will not, when he sues A, be obliged to prove that he is a holder in due course.[9]

Admissions of Maker, Acceptor, Drawer

The maker, drawer, acceptor "admits the existence of the payee and his then capacity to endorse." Sect. 60, 61, 62. Admits when? Only at the time of making, drawing, accepting? Evidently not. He continues to admit, when the last holder becomes such, and also when a suit is being tried upon the instrument. But does he simply admit? Or does he conclusively admit, so that no denial is allowed? Clearly the last was intended. Why was it not said?

But, is it true that the maker of a note admits the existence of the payee? A, erroneously thinking that B, who was alive last year, is still alive, makes a note payable to him, and delivers it to some one to be delivered to him. Has he precluded himself from showing that B did not exist when the note was made, or that he then had the capacity to endorse? The existence and capacity to endorse would be never relevant unless there had been

[9]Cf. Kinney v. Cruse, 28 Mo. 183; Voss v. Chamberlain, 139 Iowa 569.

an actual endorsement by some one who purported to be the payee. If the payee were dead, such endorsement would be a forgery and no title could be made through it. The theory of admission of capacity to endorse would be useless.

Section 62 states that the acceptor *ipso facto* "engages that he will pay the bill according to its tenor." Then follows the declaration that he admits certain facts to exist. But, if he engages to pay, what more is necessary? How matters it, whether he admits or not? What is meant is, evidently, that the acceptor engages to pay the bill, whether the drawer existed or the bill was drawn by him or not, whether, if he existed and drew, he had the legal capacity to bind himself by drawing or not; whether the payee existed or had legal capacity to endorse or not.

An endorsee must prove the actual endorsement of the payee. In doing so he proves the existence and the capacity to endorse. What is then the use of the admission of the acceptor that he exists and has, at the moment of receiving the acceptance, the capacity to endorse?

Endorsement Before Delivery

Clause 2 of Section 64 provides that when one, not a party puts his signature to the instrument before delivery, if the instrument is payable to the order of the maker of a note or the drawer of a bill, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. As Prof. Ames points out, this fails to make one who endorses a bill for the accommodation of the acceptor, liable as he should be to the drawer.

Warranties

A transferror, of an instrument, without indorsement, or with endorsement without recourse, is not liable as indorser. But he is liable as a warrantor. He warrants that the instrument is genuine; that it is his, that prior

parties had capacity to contract, and that he knows no fact which would impair the validity of the instrument, or render it valueless. A distinction absolutely without justification, is drawn between transfers without endorsement and transfers by qualified endorsement. In the former the warranty is available to the immediate transferee only. Impliedly, in the latter, it is available to any later transferee, that is the warranty is negotiable. Mr. McKeehan's statement that when there has been no indorsement, there has been no assignment of the warranty is no sufficient answer. The instrument has been negotiated. Negotiation would have passed the warranty, had the act said so. Its refusing to say so, while saying that an endorsement without recourse does pass the warranty is wholly arbitrary and illogical. The function of an endorsement without recourse is exactly the function of a delivery of an instrument payable to bearer. If the latter negotiates both the instrument and the warranty, so should the former.

What are the liabilities of the endorser without qualification? The 66th section says there are two. He warrants and he engages. He warrants, besides the genuineness of the instrument, besides his title to it, besides the capacity of all prior parties to contract, that the instrument is at the time of his endorsement, valid and subsisting. But, when one endorses for accommodation, does he warrant that he has a good title to the instrument endorsed? Plainly not. Prof. Ames and Mr. McKeehan justly criticise the act for imposing a warranty on one who, not being the owner and not professing to sell the instrument, simply endorses it. The liability of endorser and that of warrantor are not of equal scope. The endorser is not liable until the instrument matures. The warrantor is liable at once. The warrantor's liability is not contingent on demand of payment at maturity and notice of dishonor. That of endorser is so contingent. The liability of the warrantor is for the damage resulting from the breach, the price paid

being the maximum recoverable sum. That of the indorser is for the face of the instrument with interest, however much less the consideration paid for it by the plaintiff.

We have again an instance of the tendency to make unwarrantable distinctions. The seller of a note or bill without indorsement warrants not the validity or the value of the instrument, but his ignorance of any fact which could impair that validity or value. The indorser warrants the validity, (but not the value). If the indorser warrants validity, whether he has knowledge or not, why does the seller of the instrument without indorsement not do the same?

The indorser "engages" to pay the instrument, on the doing of certain acts by the holder without obtaining payment, but the doing of these acts is not necessary to consummate the liability as warrantor.

Joint Endorsers

Joint payees or joint endorsees who indorse, says Sect. 68, are deemed to endorse jointly and severally. Prof. Ames and Mr. McKeehan object that if this is so, joint makers ought likewise to be jointly and severally liable. And why not?

Presentment of Instrument Payable on Demand

Sect. 71 directs that presentment for payment of a bill of exchange, payable on demand, may be made within a reasonable time after the last negotiation, but presentment of any other negotiable instrument must be made on the day it falls due. Why was this distinction made? The negotiation of a note which is negotiable, must be anticipated as well as that of a bill. Why must the former be presented within a reasonable time after its issue, but the latter only within a reasonable time after the last negotiation? Literally interpreted, no regard is to be paid to the intervals between the negotiations, when there are several. A bill payable on demand is negotiated 4 years after its issue. Demand is made for payment three days thereafter.

The demand is in time! No distinction is made between notes or bills payable on demand with interest and those not bearing interest. The interest bearing property of the instrument does not prolong the period of permissible delay in presenting for payment.[10]

Person To Whom Presentment Is To Be Made

The 72d Sect. states that presentment must be made "to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made." Absent, means absent from the "proper place" for making presentment. What does "inaccessible" mean? Possibly inaccessible at that place? Why use a phrase which fails to allay a doubt?

Place of Presentment

Sect. 73 enacts that when no place of payment is specified and no address is given, it is proper to present "at the usual place of business or residence of the person to make payment." This gives the holder the option to present at either place. The English Bill of Exchange Act gives precedence to the place of business, if known, and allows presentment at the "ordinary residence," only when the place of business is not known.

Presentment Unnecessary

The drawer cannot insist that presentment should be made, when he has no right to expect or require that the drawee or acceptor will pay the instrument, says Sect. 79. What is a *right* to expect? Can it exist, when there is no *right* to require? Does the friendship of the drawee, does his past habit of paying the drawer's bills, give a *right* to expect or require that he will pay the bill?

When a note is made, or a bill accepted for the accommodation of the indorser, says section 80, his duty to pay

[10]Commercial Nat. Bank of Syracuse v. Zimmerman, 185 N. Y. 210.

is not contingent upon the making of presentment to the acceptor or maker, if he has no reason to expect that the instrument will be paid if presented. The Illinois act may have done well, in omitting the reference to a reason to expect payment. Why should the party accommodated, have reason to expect the accommodator to pay?

Presentment is unnecessary when reasonable diligence to make it has been unsuccessful; when the drawee and acceptor of a bill is a fictitious person, and when presentment has been expressly or impliedly waived.

Failure to Give Notice of Dishonor

The 89th section requires notice of dishonor to be given to the drawer and endorsers, on pain of discharging drawer or indorsers who are not notified. No exception is made, in the case of a check which the bank fails to pay. Sect. 186 discharges the drawer of the checks only to the extent of the loss incurred to him by delay in presenting it. Prof Ames and Mr. McKeehan call attention to the failure of section 89 to except the case of the check.

Discharge of Instrument

Among the acts which, according to Sect. 119 will discharge a negotiable instrument, is any act "which will discharge a simple contract for the payment of money." Prof. Ames styles this a "startling innovation." As a simple contract for the payment of money will be discharged by a payment made before it becomes due, this clause discharges a bill or note, when paid before due. But, suppose it is reissued before maturity by the maker or acceptor, and comes to a holder in due course. Can payment to him not be enforced? Not, if the 4th clause of Sect. 119 is carried out. Mr. McKeehan thinks it "unbelievable" that the courts will give effect to it.

Discharge of Person Secondarily Liable

Sect. 120 declares that a person who is secondarily liable on the instrument shall be discharged "by the dis-

charge of a prior party." This is characterized by Prof. Ames as the "most mischievously revolutionary provision in the new code." A discharge by the statute of limitations, by the death of a surety to the principal maker, by the failure to give notice of dishonor to a prior endorser, would discharge a later party, in violation of the doctrine accepted theretofore. Judge Brewster makes the clause mean a discharge of a prior party by the holder. Possibly the courts will accept this interpolation.

The person secondarily liable is by the 5th clause also discharged "by a release of the principal debtor," unless the releasing party expressly reserves his right of recourse against the party who is secondarily liable. If by "principal debtor" is meant the person ultimately liable for the debt, no objection could be made to this clause. But, if it means the "person primarily liable in the instrument," it would make a discharge of a maker for accommodation, a discharge of the party accommodated, an inequitable result.

The 6th clause discharges a person secondarily liable, by agreement binding on the holder to extend the time of payment or to postpone the right to enforce the instrument, unless the party secondarily liable assents to the agreement, or unless the right of recourse against him is expressly reserved. Why should an extension of time to the maker or acceptor for accommodation discharge an accommodated drawer or endorser? The criticism of Dean Ames is fully justified.

Alteration of Instrument

Sect. 124 enacts that "where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided," for all except these who made, authorized, or assented to the alteration, and subsequent indorsers." It is to be noted that no exception is made of alterations made by strangers to the instrument. An alteration by whomsoever, avoids the instrument.

When the instrument however, after alteration, is in the hands of a holder in due course who is not a party to it, "he may enforce payment thereof according to its original tenor."

Number of Drawees

Sect. 128 enacts that "a bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession." Both the English Bills of Exchange Act and the American act prevent the addressing of a bill to two or more persons in the alternative. Some earlier cases apparently realized no difficulty in allowing such address.[11] The 131st Sect. allows the drawer or any endorser of a bill to insert in it the name of a "referee in case of need," to whom resort may, at the option of the holder, be had in case the bill is dishonored by non-acceptance or non-payment. It is difficult to understand why two or more alternative drawees should not be permitted. The 141st section allows the acceptance of some one or more of the drawees. Strange, then, that the drawees could not be alternatively named.

Acceptance

Sect. 134 prescribes that when an acceptance is on some other paper than the bill itself, it binds the acceptor only towards a person to whom it is shown, and who, on the faith thereof, receives the bill for value. If it is put on the bill itself, even after the bill has been bought, the holder may enforce the acceptance, though he did not buy the bill in reliance upon it, a distinction which it would be difficult to justify. If reliance on the acceptance is not necessary to make it enforceable in one case, it should not be necessary in the other. A written promise to accept a bill, before it is drawn is deemed an actual acceptance (Sect.

[11] 1 Daniel on Negot. Inst. p. 121.

135) in favor of one who, upon the faith thereof, receives the bill for value.

Contructive Acceptance

Sect. 137 enacts that "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within 24 hours after such delivery, or within such other period as the holder may allow to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same." As critics of this act have observed, the destruction of a bill is a singular way of accepting it. To fail or neglect to return the bill within 24 hours, is to refuse to return it, and is an acceptance.[12]

Presentment For Acceptance

There are cases (Sect. 143) in which presentment for acceptance must be made. In other cases, it is not necessary. In the first class of cases, the holder must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged. But, if the bill is not presented but negotiated within a reasonable time, is the duty of presentment discharged? If not, when must it be made? The act yields no answer. Sect. 145 contains the provision that when the drawee has become a bankrupt or insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. The acceptance imposes an obligation not theretofore existing. Under what circumstances the trustee or assignee can create this obligation, the act does not disclose.

[12]Wisner v. First Nat. Bank, 220 Pa. 20. The act of April 27th, 1909, P. L. 260 has declared that the retention of a bill, unless its return has been demanded, shall not amount to an acceptance; and as excepted checks from the operation of the 137th section. The section however, thinks Brannan (The Negotiable Instruments Law, p. 136) does not apply to checks which are not presented for acceptance or certification.

Notice of Non-Acceptance

When a bill is dishonored by non-acceptance, Sect. 102, notice must be given within the times mentioned in Sects. 103 and 104. Sect. 150 enacts that the person presenting the bill must treat it as dishonored by non-acceptance, or he loses the right of recourse against the drawer and indorsers. Even when presentment for acceptance is at the option of the holder, if he in fact presents, and fails to obtain acceptance, he must treat the bill as dishonored, and give immediate notice to the drawer and indorsers; otherwise they will be discharged.[13] And, on the giving of this notice, he has an immediate right of recourse against the drawer and indorsers. No presentment for payment is necessary. (Sect. 152).[14]

The former law of Pennsylvania in this respect, seems to be set aside by the Negotiable Instruments Act. A bill was drawn in Philadelphia on a merchant in Londonderry, Ireland, payable to a third person at 60 days sight. Such a bill had to be presented for acceptance. It was so presented, but acceptance was not obtained. Nor was notice given to the payee who had indorsed the bill, and who was defendant in an action thereon, by a subsequent indorsee. The bill was subsequently protested for non-payment; and notice thereof was duly given to the defendant. A judgment was rendered for the plaintiff.[15] In House v. Adams & Co.[16] the bill was payable six months after date. Reed, J., observed that presentment for acceptance of a bill payable at a certain period after date is unnecessary, and that, in Pennsylvania the drawer is not discharged for want of notice of non-acceptance provided he receives notice of non-payment.[17]

[13]Eaton and Gilbert, Commercial Paper, p. 592.

[14]Mason v. Franklin, 3 Johns. 202; Weldon v. Buck, 4 Johns. 144; Winthrop v. Pepoon, 1 Bay (S. C.) 468; Watson v. Loring, 3 Mass. 557; Lennox v. Cook, 8 Mass. 460.

While the Negotiable Instruments Act authorizes a suit immediately on dishonor by non-acceptance, it says nothing as to the amount that would be recoverable in such suit. Would it be the face of the bill with interest from the time of dishonor, or would it be the present worth at that time, of the bill, if payable at some future time, with interest thereon?

Payment For Honor

Sect. 175 enacts that "where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid, are discharged, but the payer for honor is subrogated for, and succeeds to both the rights and duties of the holder, as regards the party for whose honor he pays, and all parties liable to the latter." This rule was laid down by Lord Erskine in 1808, in Ex parte Lambert, 13 Ves. 179. In 1868, in Ex parte Levan, Malins, V. C. condemned this doctrine and decided that the payer for honor should have the rights of the holder against the person for whose honor he pays and all parties prior (not liable) to him. Prof. Ames thinks the overruled case adopted into the code by an oversight. Not so Judge Brewster, nor Mr. McKeehan. These gentlemen think the rule of Lord Erskine preferable, and that it was consciously preferred by the codifiers.

Time For Presenting a Check

A check must be presented for payment, says Sect. 186, "within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." A check, says Sect. 185, is a bill of exchange drawn on a bank payable on demand. Except as provided in the act, the provisions of the act applicable to a bill of exchange payable on demand, apply

[15]Reed, Adm. v. Adams, 6 S. & R. 356.

[16]48 Pa. 261.

[17]Citing Reed v. Adams, 6 S. & R. 356.

to a check. Sect. 89 declares that when a negotiable instrument (therefore a bill of exchange, a check) has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, otherwise such drawer or indorser is discharged. Hence, failure to give notice to the drawer of the non-payment of a check by the bank on which it is drawn, should discharge him. But, if delay in presenting the check does not discharge, altogether, but only to the extent of loss caused by the delay, failure to give notice of the bank's refusal to pay the check ought not to discharge altogether, but ought to discharge only to the extent of the consequent loss. Judge Brewster concedes that the effect of failure to give notice ought to be the same in both cases. For not saying so, the act is clearly amenable to the criticism which Prof. Ames and Mr. McKeehan make of it.

MOOT COURT

COMMONWEALTH v. JONLET

Criminal Law—Assault With Intent to Kill—Constructive Intent

STATEMENT OF FACTS

Jonlet shot at Smith with the intention of killing him, but hit and wounded Anshon accidently. Jonlet was indicted for an assault with intent to kill.

Todd, for plaintiff.

Balogh, for defendant.

OPINION OF THE COURT

WEISS, J. Where a person engaged in the commission of a crime that is malum in se does an act unintended by him, the intent to commit the crime in which he was engaged is carried over to the act done, and supplies the intent necessary to make the act done a crime. The intent in such case is called "constructive intent." Clark Crim. Law, p. 56.

An intent to do some other wrongful act from the doing of which the forbidden act results as an unintended consequence is called constructive intent. 18 D. L. R. 259.

Referring to the facts we note that Jonlet shot at Smith with the intention of killing him, but hit and wounded Anshon accidently.

No one will deny that Jonlet was engaged in committing an act malum in se, when he shot at Smith with the intention of killing him. It is not essential to the constitution of a crime that the accused should commit the very act intended by him and therefore, when a man does one wrongful act while intending to do another, he may be criminally liable for the latter. It is true that Jonlet never actually had the specific intent to shoot Anshon, but the actual crimnal intent, or guilty mind in the first instance concurring with the act already done, is enough to constitute a crime. The intent in such cases may be construed and is absolutely essential, if guilt is to be affixed upon defendant in this case.

For example, if a man shoot at a fowl with intent to steal it, and accidently kill a man, he is guilty of homicide; or where several persons co-operate to rob, and while pursuing their object the person assailed is killed, all are guilty of homicide. State v. Barrett, 40 Minn. 71.

In Ruling Case Law 531. It is a correct proposition that every person is liable for the direct, natural and probable consequence of his own act, and that everyone doing an unlawful act is considered the doer of all that follows. Likewise, where one puts in motion a missile with a specific intention of hitting another therewith, but through poor aim or the agility of the person aimed at, the object misses him and hits another, the aggressor is liable for the injury caused. Peterson v. Haffner, 59 Ind. 130; Dunaway v. People, 110 Ill. 333.

In the case at bar, Jonlet was indicted for an assault with intent to kill Anshon and the court is of the opinion that the indictment was correct. Clarke, Crim. Law, 3rd Ed. p. 259, note 3 states that, "Shooting at one person with intent to kill him and hitting another, is an assault with intent to kill the latter."

In State v. Gilman, 69 Me. 163, the indictment charged an assault with intent to kill. It appeared that defendant deliberately discharged a loaded gun into a crowd. It was held proper to charge the jury that the intent to kill characterizes the act, goes with it and, if the blow reaches any person, it carries with it the criminal intent to kill and murder; if it takes effect upon a person other than the one intended, the crime is made out precisely the same as though the intention had been to kill and murder the person hit.

State v. Jump, 90 Mo. 171: We have a case analogous to the one under consideration. The prisoner was indicted for an assault upon W. J. Martin with intent to kill. He had really intended to kill Mitchell. The court held that, "one who threw a stone at another and struck a 3rd person not intended, was rightly convicted of an assault with intent to kill the latter."

Again in Wareham v. Ohio, 25 Ohio State 601, the indictment read for the murder of one David Kirby. He had intended to take the life of Carpenter. The doctrine was that where one person purposely and maliciously strikes with intent to kill one person and the blow takes effect upon and kills another, the slayer is guilty of murderer."

Commonwealth v. Breyessee, 160 Pa. State 451 held "Where a deliberate purpose is found to kill one person and the defendant fires a pistol at him for that purpose the fact that the bullet misses its intended victim and kills another person does not relieve the murderer.

37 L. R. A. (N. S.) 172 (Note)—It is well settled that one who in attempt to kill another person, injures a third, is guilty of an assault with intent to murder the latter. State v. Montgomery, 91 Missouri 52; Louisiana v. Thomas, 127 La. 576; Vandermark v. People, 47 Ill. 122.

In view of the fact that the doctrine of constructive intent is predominant in this commonwealth, we are constrained to decide that the indictment was regular and all proceedings thereunder are therefore affirmed.

OPINION OF SUPREME COURT

It has been held that where a statute makes criminal "an assault with intent to kill" a person intending to shoot A but accidently shooting B can be properly convicted of an "assault upon B with "intent to kill." St. v. Thomas, 127 La. 576, 53 So. 868. The theory of this holding is that under such a statute and indictment an interest to kill anyone is sufficient. See also St. v. Gilman, 69 Me. 163.

Such cases must be distinguished from those, in which, under a statute making criminal an assault upon a person with intent to kill such person, it has been held that a person intending to shoot A but accidentally shooting B cannot be convicted (St. v. Mulhall, 199 Me. 202, P. v. Keefer, 18 Cal. 636) contra. Callahan v. S. 21 O. S. 306.

In the present case if the defendant had been indicted for assault upon Anshon with intent to kill Anshon, a conviction would have been proper.

Does the fact that the indictment goes beyond the terms of the statute and alleges an intent to kill the person hit require the statute to prove an intention to kill the person hit?

The weight of authority appears to answer this question in the affirmative. St. v. Shanley, 20 S. D. 18; 26 H. & R. 452. But the contrary doctrine is supported by very respectable authority. Waler v. St., 8/ Ind. 290; St. v. Gallagher (N. J.) 85 Atl. 207.

In Mays Criminal Law it is said, 'Where one shoots at A and hits B he may be indicted for an assault with intent to kill, but where one shoots at A and hits B an indictment for an assault upon B with intent to kill B is not good, because the intent as now alleged n the more specific form cannot be established." p. 38. See also 7 L. R. A. (N. S.) 630; 37 L. R. A. (N. S.) 174, which contain an exhaustive discussion of the cases. Judgment reversed.

KOVEN v. INSURANCE CO.

Evidence—Insurance—Admissibility of Copy of Application, Under Act of May 11, 1881, P. L. 20

STATEMENT OF FACTS

Henry Koven applied for insurance, to the extent of $5,000, on his life. The application stated his age at 30 years and that his father died at 62, of tuberculosis, and his mother at 70, of Bright's Disease. The copy of the application erroneously stated the applicant's age as 20, and the death of his father at 60, and of his mother at 65. At the trial the defendant endeavored to defeat a recovery by showing that the "copy" was untrue in important respects, and offered the application for the purpose of proving this, as by an admission. The court excluded the offer. Verdict for the plaintiff. Motion for a new trial.

Gregg for plaintiff.

Gorson, for defenadnt.

OPINION OF THE COURT

LEE, J. The question involved is: Can the defendant introduce the original application for insurance for the purpose of showing, as by an admission, that the copy was untrue. This case is governed by the Act of May 11, 1881, P. L. 20, II. Purdon 1955, which is as follows:

"All life insurance policies upon the lives or prosperity of persons within this commonwealth whether issued by companies organized under the laws of this state or by foreign companies doing business therein, which contain any reference to the application of the assured, or the constitution, by-laws, or other rules of the company either as forming part of the policy or contract between the parties thereto or having any bearing upon said contract, shall contain or have attached to said policies correct copies of the application as signed by the applicant and the by-laws referred to, and unless so attached and accompanying the policy, no such application shall be received in evidence in a controversy between the parties, or intrusted in, the said policy, nor shall such application or by-laws be considered a part of the policy between such parties."

(1). "A copy is a true transcript of an original writing." Bouvier's Law Dictionary, page 436; Anderson's Law Dictionary, page 257.

(2). This act is in its nature penal, and must be strictly construed.

(a). Under Act May 11, 1881, If any use is to be made of the application for insurance, there must be a correct copy thereof "as signed by the applicant" attached to the policy. If no such copy appears, an alleged copy appended to the policy, not conforming to the requirements of the act will be rejected by the court. Fire Ins. Co. v. Hallock, 22 W. N. C. 151; 14 Atl. 167.

(b). Morris v. Mutual Life Assur. Co., 183 Pa. 563, construes Act May 11, 1881. Where medical examiner's report is part of application, but is not contained in copy of application attached to policy, the policy is not attached within meaning of the act and is not admissible in evidence.

The policy here was physically attached to application, but not within meaning of act.

(c). If act was passed to keep applicant's statements before his eyes so that he might know his contract and rectify mistakes before it is too late, nevertheless the act must be strictly construed.

(d). An application for the policy shall not be received in evidence unless attached to policy by Act May 11, 1881, and even if there was a blank form of application on back with the words: "I accept this as a copy of my application, but I agree that the original shall be admitted as the correct application if copy varies therefrom," if it was not shown that the insured saw the pretended copy of the application on back of the policy, it shall not be admitted. Zimmer v. Ins. Co., 207 Pa. 472. Here there is no evidence that plaintiff saw or read the policy. Furthermore the plaintiff is not seeking to introduce the original application and therefore there can be no estoppel as against him as defendant contends.

(e). The application was rightly excluded from the testimony. The provision of the act are conclusive on this point. No copy of the application or of the by-laws of the company were attached to the policy as the act requires; it constituted, therefore no part of the policy of the contract between the parties and was not receivable in evidence. The case is to be considered as if no such paper existed. Imperial Ins. Co. v. Dunham, 117 Pa. 460 (473).

In the case at bar the defendant's own evidence shows there was no correct copy attached to the policy as is expressly required by the act. Here the act excludes the introduction of the original application in evidence.

(f). The company by the policy copy says to the insured that his father and mother died at such ages and that the contract was

made upon that basis, and such is his contract. He thereupon relies upon having made such representation. Then when suit is brought on the policy, the insurer claims immunity on the ground that they died at different ages and produces the application in evidence, claiming that therefore it should tend to keep insurer from being entrapped and negligent.

Since the act prohibits the introduction of application for any purposes in evidence, it cannot be introduced to show an admission. But for this act an insurance company could defraud all persons insured, by simply stating different ages in copy from that which were in application.

III. Since the copy stated the age of Koven as 10 years less than in application, this would tend to lessen amount of premiums to be paid by Koven. The insurance company evidently knew this, but for obvious reasons did not bring it out.

IV. In McCaslin v. Metropolitan Life Ins. Co., 59 Sup. 475, we have a case practically on point. In that case in an action upon a life insurance policy, the defendant alleged misrepresentations in the application. The plaintiff avers that the paper attached to the policy was merely a copy of the original application and produces a paper which the testimony of a number of witnesses tends to show was the original application, and an inspection of the paper shows that the paper not attached to the policy represented that the mother of the insured died at the age of 42 while that attached stated that she died at 45 and the jury by its verdict established the fact that the original application was not attached to the policy, all offers of evidence relating to misrepresentations as to the health of the insured in the application are irrelevant and immaterial.

V. If a correct copy of the application is not attached to the policy in accordance with the requirements of the Act May 11, 1881. P. L. 20, it is not part of the contract and it is to be considered as if no such paper existed and a recovery may be had upon the policy. Imperial Ins. Co. v. Dunham, 117 Pa. 460; Hebb v. Ins. Co., 138 Pa. 174; Haverstick v. Mut. Fire Assn., 156 Pa. 333.

In view of the above stated authority the defendant's offer of the application in evidence was properly excluded and the question is answered in the negative.

Motion for new trial refused.

OPINION OF THE SUPREME COURT

The defendant in this case did not contend that the facts stated in the application were false, but admitted that they are true and

asked that the application be admitted in evidence to show that the facts stated in the "copy" were false.

But what was the purpose which the defendant desired to subserve by proving that the "copy" was false. The act of 1881 was intended to protect the insured by imposing upon the insurer the duty of attaching to the policy a "correct copy" of the application. To permit the company to avail itself of its failure to perform this duty for the purpose of avoiding liability upon the policy would be a plain perversion of the purpose of the act.

It does not appear that Koven ever saw the "copy" and it cannot be said that there was a duty upon him to read his policy for the purpose of seeing whether a "correct copy" had been attached. "He had the right to assume that, the appellant, as an honest insurance company, had observed the law passed for his protection by attaching a correct copy of his application" and even if he had read the policy "he would have found nothing upon it committing him to the substitution of an incorrect for a correct copy of the application." Zemmer v. Ins. Co., 207 Pa. 477. The language of the court in Robson v. Ins. Co., 51 Super. 495, "There was a mistake in the policy. This was due to a mistake of some officer of the company. We are now asked to visit the effect of this mistake upon the insured and thus enable the company to profit by its own carelessness. The decisions do not require us to do so. Where a mistake is chargeable not to the insured but to the company's agent it should be imputed to the company itself," is applicable to this case.

Judgment affirmed.

COMMONWEALTH v. CLOYD

STATEMENT OF FACTS

Criminal Law—Arson—Evidence—Admissibility of Animal Traits

Indictment for burning a house. Some evidence tending to show the presence of Cloyd near the house being given, evidence was offered of a bloodhound tracing the footsteps of a man to Cloyd's home, a quarter of a mile distant. That the dog was of pure blood and had on at least fifty instances of trial been uniformly successful in tracing the person was proved. The court allowed the jury to consider this evidence in connection with other evidence.

Johnson for appellant.

Hollis, for Commonwealth.

OPINION OF THE COURT

SAVIGE, J. The recognized rule is that the corpus delicti in arson consists of two elements, viz., (1) The element of burning, and (2) the criminal agency in causing it. This observation is analogous as a matter of evidence to the crime of murder, as to which the rule is recognized that murder consists of two elements, (1) the fact of the death of the deceased, which must be shown by direct testimony or presumption of the strongest kind, and (2) the fact of existence of criminal agency, which is the proper subject of presumptive reasoning. In murder or arson this evidence of criminal agency need not be conclusive in character. The facts in the case at bar state "some evidence tending to show" Cloyd's presence. It is for this reason that corroborative evidence is given. It must be noted that this piece of evidence of the tracing of the blood hound is only in corroboration, and is not relied upon solely by the Commonwealth in establishing the conviction of Cloyd. If nothing appears but that the house was consumed by fire the presumption is that it occurred thru accident and was not of incendiary origin. This criminal agency or wilful firing by a responsible person may be shown by such estimony as that of conversations or declarations of the accused, or that he tried to intimidate witnesses who he thought might appear against him. A more extrajudicial confession of arson will not warrant a conviction of arson unless corroborated by proof aliunde of the corpus delicti. Spears v. State of Miss., 16 L. R. A. (N. S.) 285. Also see the extracts of cases given in connection therewith in the notes. State of Kan. v. Glenn Adams, 35 L. R. A. (N. S.) 870.

From the foregoing it is obvious that the corroborative evidence need not be the highest character of evidence. However, such testimony must be shown to be well founded. The leading authority on this question is a case in which a new trial was granted because of the admission of incompetent testimony, yet the court took the pains of stating what it believed to be the law on this subject, and its reasoning has been quite generally held as prevailing in later cases. I refer to Pedigo v. Commonwealth, 19 Ky. L. Rep. 1723, 42 L. R. A. 432. Justice Da Relle says, "It is a matter of common knowledge of which courts are authorized to take notice that dogs of some varieties are remarkable for the acuteness of their sense of smell . . . . . ."

In the above case four elements are laid as the foundation to the admission of such evidence, to which, in our humble sense of justice we would add a fifth. To make such testimony competent it

must appear (1) that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that the dog in question is possessed of these qualities; (3) that he has been trained or tested in the exercise of tracking human beings; (4) that he was laid on the trail concerning which testimony has been admitted at a point where circumstances tend to clearly show that the guilty party had been, and (5) that the trailing was done within such time after the alleged criminal act that there is but slight chance that the accused has passed over the same route since, and within such time beyond which it is reasonable to suppose that the scent has so passed away that the olfactory nerves of the canine would no longer be able to discriminate or follow the trail. Under these circumstances the testimony may go to the jury for what it is worth. It has been held that evidence that another dog of the same breed as the one in the trial left a trail, traced and killed a sheep was inadmissible for the test cannot be by comparison. In Pedigo v. Com., the dog had not been trained or tested. We infer that the jury found all the foregoing requirements existing in this case when it was first up for trial, and we accordingly rule that this evidence was admissible.

The counsel for the appellant argues rather ingeniously and with some show of reason that the testimony of a dog is inadmissible because he does not understand the nature of an oath. The purpose of the oath is to prevent deliberate falsifying, for a mistaken witness is not necessarily guilty of perjury, but who has ever heard of a dog telling a deliberate falsehood? What motive of interest would prompt him to do so? It is also argued that there is no privilege of cross examination. What questions that would be directed that cannot be directed to the witnesses who lay the foundation of the testimony, which are also relevant to the issue, are not set forth in substantiation of this contention; nor are we able to see the weight of the argument. Guffy in a dissenting opinion in Pedigo v. Com., says with more seeming confidence than any show of reason "it seems to me the use of the blood hound properly belonged to the days of slavery, and to the bloody criminal code of the Dark Ages; and inasmuch as the institution of slavery and the code have ceased to exist the hound should be relegated to innocuous desuetude." He might have syllogized thus: "The donkey was a beast of burden during the Dark Ages; customs and institutions of the Dark Ages has been supplanted by modern conveniences and methods; therefore, the donkey must no longer be used as a beast of burden, and likewise the cow must no longer be used as a means of milk supply. Surely if dogs could trace slaves and criminals

1000 years ago because those qualities were inherent, the same as their powers of barking or baying, or their coveting the society of man, they can do so today. Native qualities and powers in families of the animal kingdom, while they are to a certain limited extent subject to education and training, yet they do not change like styles in the wearing apparel of the human family. We admit that this phase of evidence, like all other expert testimony is comparatively new in our system of judicial procedure, as is pointed out in State of Ohio v. Benjamin Dickerson, 77 Ohio 34, 13 L. R. A. (N. S.) 341, at page 346-7. We cannot agree with Brott v. State, 70 Neb. 395; 63 L. R. A. 789.

Motion for new trial refused.

OPINION OF THE SUPREME COURT

The defendant in this case was convicted upon the testimony as to the conduct of the blood hound and "other evidence." What the other evidence was, does not appear. The sole question before this court is therefore, whether the testimony as to the conduct of the blood hound was admissible.

Tho it has been stated that the admission of such evidence "is a novel feature in our jurisprudence, and is attended with some danger, against which courts must guard as the occasion arises, and when the circumstances are at all doubtful," the conclusion reached by a large majority of the courts is that such evidence, under certain limitations, all of which have been complied in this case, is admissible. Wigmore on Evidence, Vol. 1, Sec. 177, vol. 5, sec. 177. C. v. Hoffman, 52 Super. 272; C. v. Nace, 59 Super 210.

Affirmed.